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No. A-63

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 2, 1980

## QUESTION PRESENTED FOR REVIEW

Whether sex-based wage rate discrimination claims are subject to a different standard of proof, when such claims are asserted under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-1 to 2000e-17 (1976), than the equal pay for equal work standard applicable to claims presented under the Equal Pay Act, 29 U.S.C. §206(d)?

## PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are listed in the caption to this petition. The Complaint filed in the district court named Captain Stan Freese and Sergeant Clarence Ramseth as defendants, in their capacities as Washington County Police Officers, but they were dismissed as defendants from the suit by stipulation in the district court proceeding.

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Respondents.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 602 F.2d 882 and appears in the Appendix hereto (20a-56a). The court of appeals supplemental opinion on denial of rehearing (1a-19a) is not yet officially reported, but is unofficially reported at 22 F.E.P. Cases 1650. The court of appeals' judgment reverses in pertinent part the decision of the United States District Court for the District of Oregon (57a-76a) which is not yet officially reported, but is unofficially reported at 20 F.E.P. Cases 788.

## JURISDICTION

The judgment of the court of appeals was entered on August 16, 1979. The court of appeals' order denying the petition for rehearing and suggestion for rehearing in banc was filed on May 1, 1980. On July 21, 1980, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to September 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C.

§1254(1).

## STATUTES INVOLVED

The statutes involved are: Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. §206(d)(1); Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 255, 42 U.S.C. §2000e-2(a)(1) and Section 703(h) of Title VII, 78 Stat. 255, 42 U.S.C. §2000e-2(h) (the second sentence of which is known as the "Bennett Amendment"). These statutes are set forth in the appendix hereto (79a-81a).

## STATEMENT OF THE CASE

The respondents are females who were employed as Matrons to guard female prisoners in the Washington County, Oregon jail. Males were employed as "Corrections Officers" to guard male prisoners at the jail.[1] The respon-

[1] The district court found that (cont.)

dents alleged in the Complaint that the County of Washington (the "County") had discriminated against them with respect to wages in violation of Title VII because the Matron job was assertedly substantially equal to the higher paid Corrections Officer job performed by the men jailers.[2] At trial in the district court proceeding the respondents contended that even if the Matron job was not equal to the Corrections Officer job, the County violated Title VII because the differences in pay were greater than the differences in the difficulty of the work. The County took

(cont.) Corrections Officer job was available to females but that none of the matrons had applied for the job. (68a).

[2] The district court held that it had jurisdiction of the suit under Title VII (58a). In addition to their alleged wage rate discrimination claim, the respondents also claimed that the County in violation of Title VII had terminated and refused to rehire them because they had sought equal pay. The district court found in favor of the County with respect to those claims (68a) and the court of appeals affirmed (28a). This petition refers only to the respondents' alleged wage rate discrimination claim.

the position that wages had been established through collective bargaining, the Matron job and the Corrections Officer job were not substantially equal and relief on the wage rate allegations was barred in the absence of proof that women had been paid less for performing equal work in relation to the men (61a,67a).

After trial, the district court held by virtue of 42 U.S.C. §2000e-2(h) (the Bennett Amendment, set forth in the appendix at 80a) that "the sex discrimination prohibitions of Title VII must be construed in the same manner as the Equal Pay Act" (79a). Accordingly, the district court applied to the respondents' alleged wage rate discrimination claim the Equal Pay Act's "equal pay for equal work" standard, 29 U.S.C. §206(d). The district court found that the Matron job was not substantially equal to the Corrections Officer job since the matrons had comparatively few prisoners to guard and actually spent a considerable portion of their work time performing clerical tasks (68a). Thus, the district court denied respondents' claim that the jobs at issue should have

been paid equally and also dismissed respondents' claim that the Matron job should have been accorded a higher pay rate even if it was not substantially equal to a job performed by men (70a).[3]

The court of appeals held that the district court was correct in finding that the comparison jobs were not substantially equal (28a). However, the court of appeals decided that even though respondents could not satisfy the "equal work" standard they should be permitted to show that they were entitled to higher pay under some other, unspecified standards. Accordingly, the court of appeals reversed the dismissal of respondents' alleged wage rate claim and ordered the district court on remand to consider respondents' allegation "that a portion of the discrepancy between their salaries and those of the

3 The district court explained:

> "If the jobs are substantially dissimilar that is the end of the inquiry. See 29 C.F.R. §800.120 (1965). Under these circumstances, the overpayment of corrections officers or the underpayment of matrons are not matters which I can explore or correct." (70a)

male guards could be be ascribed only to sex discrimination." (39a). In the Supplemental Opinion On Denial Of Rehearing the court of appeals indicated that if female employees could show a violation of the equal pay for equal work standard they could prevail under Title VII. but if they couldn't show equal work then they still might obtain recovery under other unspecified theories. (18a).

## REASONS FOR GRANTING THE WRIT

The judgment of the court of appeals below is in direct conflict with the decisions of the Fourth, Fifth, Eighth, Tenth and District of Columbia Circuits holding that sex-based wage discrimination claims that do not meet the Equal Pay Act's equal pay for equal work standard are not subject to relief under Title VII because (i) the Equal Pay Act and Title VII are to be construed in pari materia in the area of alleged sex-based wage discrimination and (ii) Congress intended the Equal Pay Act's equal work standard to apply to claims

of sex-based wage rate discrimination filed under Title VII as reflected in the Bennett Amendment to Title VII, 42 U.S.C. §2000e-2(h). Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. April 21, 1980), petition for cert. filed, 49 U.S.L.W. 3031 (U.S. July 18, 1980) (No. 80-82); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971); Stastny v. Southern Bell Telephone and Telegraph Co., ____ F.2d____ (4th Cir. July 28, 1980) (opinion printed in BNA Daily Labor Report dated August 13, 1980 at D-1); Orr v. MacNeill & Son, 511 F.2d 166 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

The judgment below is also in conflict with this Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125, 144 (1976), holding that because of the Bennett Amendment the Federal Wage and Hour Administrator's interpretations of the Equal Pay Act's core equal pay for equal work standard are applicable for determining whether

compensation practices are lawful under Title VII. Furthermore, the court below decided the case in a way in conflict with this Court's decisions regarding in pari materia statutory construction in Train v. Colorado Pub. Int. Research Group, Inc., 426 U.S. 1 (1976) and United States v. United Continental Tuna Corp., 425 U.S. 164 (1976), since the court of appeals' statutory construction of the Bennett Amendment effectively repeals the Congressional judgment reached in the Equal Pay Act without any Congressional intent supporting that result.

The court of appeals' judgment is incorrect as shown by the text of the Bennett Amendment, the legislative intent underlying the Equal Pay Act and Title VII, principles of in pari materia statutory construction, the contemporaneous interpretation of the Bennett Amendment issued by the Equal Employment Opportunity Commission, and the well reasoned decisions of this Court, five court of appeals and numerous district courts.

Finally, the court of appeals has decided an extremely important

question of federal law which has not been, but should be, directly settled by this Court. If Title VII wage rate discrimination claims do not have to meet the Equal Pay Act's equal work standard, the federal courts will be overwhelmed by litigation having enormous financial consequences and calling for massive re-evaluation of private and public employers' wage structures. For pay purposes, the nurse will seek to be compared to the doctor, the school teacher to the school principal, the hand assembler to the lathe operator, and so forth in endless comparisons of different jobs. Moreover, once the courts go beyond the equal work standard, the question will no longer be confined to whether jobs should be paid the same, but will involve, as in this case, how much more a lower-paying job should be paid in relationship to a higher-paying, different job. The federal courts have no experience or expertise in such job evaluation and the whole process would be contrary to Congressional intent to limit the courts' involvement in the wage area to claims concerning equal work.

## I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF FIVE COURTS OF APPEALS ON THE SAME MATTER

The Fourth, Fifth, Eighth, Tenth and District of Columbia Circuits have held, in direct conflict with the Ninth Circuit's decision in this case, that a Title VII plaintiff does have the burden of proving the performance of equal work for unequal pay in order to establish a prima facie case of sex-based wage discrimination. Stastny v. Southern Bell, supra, ____ F.2d at ____; Orr v. MacNeil & Son, supra, 511 F.2d at 171; DiSalvo v. Chamber of Commerce, supra, 568 F.2d at 596-97; Lemons v. City and County of Denver, supra, 620 F.2d at 229-30; Ammons v. Zia Co., supra, 448 F.2d at 120; Laffey v. Northwest Airlines, supra, 567 F.2d at 446.[4] The decisions in Lemons, Ammons, DiSalvo, Laffey, Orr and Southern Bell

[4] Additionally, the Sixth Circuit has affirmed a district court decision in accord with the above decisions in Lemons, Ammons, DiSalvo, Laffey, Orr and Southern Bell. See, Calage v. University of Tennessee, 400 F. Supp. 32, 37-39, (E.D. Tenn. 1975), aff'd, 544 F.2d 297 (6th Cir. 1976).

all conclude that Congress intended by virtue of the Bennett Amendment to incorporate the Equal Pay Act's equal work standard into Title VII as a limitation on sex-based wage discrimination claims.[5]

The court of appeals in this case reasoned that two interpretations of the Bennett Amendment were "plausible": (1) that the Bennett Amendment

[5] Numerous district courts, including district courts in the First, Second, Fourth, Sixth and Seventh Circuits, have also held that alleged sex-based wage discrimination claims which do not meet the equal pay for equal work standard are barred under Title VII. E.g., EEOC v. Colby College, 439 F. Supp. 631 (D.Me. 1977), vacated and remanded on other grounds, 589 F.2d 1139 (1st Cir. 1979), Johnson v. University of Bridgeport, 20 F.E.P. Cases 1766, 1770 (D. Conn. 1979); IUE v. Westinghouse Electric Corp., 17 F.E.P. Cases 16 (N.D.W.Va. 1977); Kohne v. IMCO Container Co., 20 EPD 11,858 at 11,875-76 (W.D.Va. 1979); Calage, supra, 400 Supp. at 37-39; Chrapliwy v. Uniroyal, Inc. 458 F. Supp. 252 (N.D.Ind. 1977); United States v. City of Milwaukee, 441 F. Supp. 1371 (E.D. Wis. 1977); Cullari v. East-West Gateway Coordinating Council, 457 F. Supp. 335, 341 (E.D.Mo. 1978). These district court decisions also conflict with the decision of the Ninth Circuit herein.

incorporated into Title VII all of 29 U.S.C.§206(d), including the Equal Pay Act's equal work standard; or (2) that the Bennett Amendment only incorporated into Title VII that portion of 29 U.S.C. §206(d) referring to the Equal Pay Act's affirmative defenses. (33a) The court of appeals herein held that the latter interpretation of the Bennett Amendment was "more persuasive" and determined that Title VII plaintiffs alleging sex-based wage discrimination claims are not limited to the equal work standard applicable under the Equal Pay Act. (33a).

Only the Third Circuit Court of Appeals has interpreted the Bennett Amendment in the same fashion as the Ninth Circuit. See, International Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Corp., ____ F.2d ____, 23 F.E.P. Cases 588 (3d Cir. August 1, 1980). Judge Van Dusen's dissent to the Westinghouse majority opinion emphasizes the significance of the conflict between the Third and Ninth Circuits on the one hand and the Fourth, Fifth, Eighth, Tenth and District of Columbia Circuits on the other by demonstrating that the latter interpretation

of the Bennett Amendment permits claims based upon subjective evaluation of dissimilar jobs.

This Court should grant the writ of certiorari to resolve the conflict in the law created by the decision below.[6] It is doubtful that the con-

[6] In its Supplemental Opinion on Denial of Rehearing the court of appeals in the present case made no attempt to distinguish its decision from the Tenth Circuit's decision in Lemons, supra, the Eighth Circuit's decision in DiSalvo, supra, or the District of Columbia Circuit's decision in Laffey, supra. The court of appeals did attempt to distinguish the Tenth Circit's decision in Ammons, supra, and the Fifth Circuit's decision in Orr, supra, but the attempted distinction is not persuasive. The Ninth Circuit reasoned that the alleged claims in Ammons and Orr were "equal pay-type claims" requiring an analysis under Equal Pay Act standards, (12a-14a). However, the Ninth Circuit failed to acknowledge the fact that the claims in both Ammons and Orr contained elements of "intentional" discrimination. Thus, the court of appeals' assumption that because the Tenth and Fifth Circuits applied the equal work standard, the claims must have been equal pay-type claims does not withstand scrutiny. The wage claims were rejected in Ammons and Orr because plaintiffs were not asserting, and could not assert, violations of the equal work standard. Ammons, supra, at 119; (cont.)

flict will be resolved absent review by this Court. There is no indication that the courts of appeals will adopt a consistent interpretation of the Bennett Amendment. The Tenth Circuit's Lemons decision and the Fourth Circuit's Southern Bell decision, both in conflict with the instant decision, were issued after the Ninth Circuit reached its decision herein.[7] But then the Third Circuit issued its decision in the Westinghouse case which rejected the Tenth Circuit's

(cont.) Orr, supra, at 170-71. The Ninth Circuit also reasoned that certain of the conflicting district court decisions were "inconsistent" since the courts had applied the Equal Pay Act's equal work standard to Title VII wage claims but had not applied exemptions found in other statutory provisions of the Fair Labor Standards Act (which contains the Equal Pay Act). (14a-16a). However, the exemptions of the Fair Labor Standards Act are not contained in 29 U.S.C. §206(d) and, unlike §206(d), are not cited in the Bennett Amendment. This explains why the courts have applied the substantive equal work standard in §206(d) to Title VII wage claims but not the procedural provisions contained in other sections of the Fair Labor Standards Act.

7 Although the Lemons decision was issued April 21, 1980, and the decision denying rehearing herein was (cont.)

approach. 23 F.E.P. Cases at 598. Moreover, in this case a petition for rehearing and suggestion for rehearing in banc was denied by the Ninth Circuit, clearly indicating that the Ninth Circuit has no intention of reappraising its position and conforming to the view of the conflicting circuit court and district court decisions. Confusion over the proper standard to be applied to Title VII sex-based wage discrimination claims will spread unless this Court settles the question posed herein.

## II. THE COURT OF APPEALS DECIDED THE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The court of appeals' decision that

(cont.) issued May 1, 1980, it is probable that the Ninth Circuit rendered its decision prior to Lemons, supra. The plaintiffs in Lemons have filed in this Court a petition for writ of certiorari which notes that the Tenth Circuit's Lemons decision is in direct conflict with the decision of the Ninth Circuit in this case. See Petition for Writ of Certiorari filed in Lemons v. City and County of Denver, No. 80-82, at 7.

the Bennett Amendment only incorporated the Equal Pay Act's affirmative defenses into Title VII conflicts with this Court's decision in General Electric Co. v. Gilbert, supra. The plaintiffs in General Electric alleged that the exclusion of pregnancy and maternity from a disability benefit plan discriminated on the basis of sex in violation of Title VII and relied, inter alia, upon a 1972 EEOC guideline on the subject. But this Court found that because of the Bennett Amendment "interpretations of §6(d) of the Equal Pay Act are applicable to Title VII as well. . . ." 429 U.S. at 144. And, importantly, this Court then relied upon an interpretation of the Equal Pay Act's equal work standard in rejecting plaintiffs' claims. Id. at 144-45. Despite this evident conflict with the instant decision, the court of appeals did not discuss the Court's reliance in General Electric upon an interpretation of the equal work standard.[8]

[8] The court of appeals did refer to this Court's decision in Manhart v. City of Los Angeles Dept. of Power & Water, 435 U.S. 702 (1978), (12a). However,

Moreover, the Ninth Circuit's decision herein is contrary to this Court's decisions relating to statutory construction in United States v. United Continental Tuna Corp., 425 U.S. 164 (1976) and Train v. Colorado Pub. Int.

(cont.) the court of appeals admitted that the Manhart decision did not address the question of whether the Equal Pay Act's equal work standard applied to Title VII wage claims (12a). In Manhart, supra, this Court was not called upon to decide whether the Equal Pay Act's equal work standard had been incorporated into Title VII by the Bennett Amendment. There was no doubt in Manhart that the City required women to contribute more to the pension plan than men performing the same work. However, the City argued that its practice was protected by one of the Equal Pay Act's affirmative de- fenses because it was based on a "factor other than sex" -- the fact that women on the average live longer than men. This Court acknowledged that the Equal Pay Act's affirmative defenses had been incorporated into Title VII by the Bennett Amendment and then determined that the City's practice was not protected by one of the affirmative defenses. 435 U.S. at 711-13. But the Manhart decision is in no way inconsistent with the General Electric decision which indicates that the equal work standard as well as the affirmative defenses was incorporated into Title VII by the Bennett Amendment.

Research Group, Inc., 426 U.S. 1 (1976). In United Continental Tuna, thelower court had held that an amendment to the Suits in Admiralty Act allowed plaintiffs to sue the United States under that Act and ignore the applicable and more stringent Public Vessels Act. This Court rejected that construction of the Suits in Admiralty Act because it amounted to a repeal of the Public Vessels Act by implication without legislative history indicating that Congress intended that result. 425 U.S. at 169. Similarly, in Colorado Pub. Int. Research Group this Court rejected a construction of the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq., which would have substantially altered the regulatory scheme established under the Atomic Energy Act, 42 U.S.C. §2011 et seq., without express Congressional intent supporting that result. There, the Court held that a construction of the more recent statute was improper because it altered the policy of the earlier statutory scheme without a "clear indication of legislative intent". 426 U.S. at 24. In the instant case, the Ninth Circuit's con-

struction of the Bennett Amendment and Title VII repeals the Equal Pay Act by implication without any legislative history indicating that Congress intended to abandon the carefully developed equal work standard applicable to the wage discrimination area.

With respect to the Equal Pay Act, Congress spent eighteen months deliberating over the entire area of sex-based discrimination and decided to limit the involvement of government and the courts to claims meeting the equal work standard. In the 1963 debate on H.R. 6060, which contained the equal pay for equal work standard eventually adopted by Congress in the Equal Pay Act, Congressman Goodell, the sponsor of H.R. 6060, stated:

> "Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> "We do not expect the Labor Department people to go into an

establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear." 109 Cong. Rec. 9197.[9]

[9] Congressman Frelinghuysen stated that "the administration of the equal pay concept, . . . will not be excessive nor excessively wide ranging. What we seek is to insure, where men and women are doing the same job under the same working conditions, that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses." (Emphasis added) 109 Cong. Rec. 9196. See also the comments of Congressmen Griffin and Thompson, 109 Cong. Rec. 9197-98 (concerning examples of jobs that Congress intended not be compared for purposes of wage discrimination claims), and the comments of Congresswoman St. George and Congressman Landrum, 108 Cong. Rec. 14767-68 (1962) (concerning the views of the House in amending a 1962 equal pay proposal to provide for an "equal work" standard, rather than a "comparable work" standard).

Congressman Goodell also stated that it was "not intended that the Secretary of Labor or the Courts will substitute their judgment for the judgment of the employers." 109 Cong. Rec. 9209. Similarly, he said "[i]t is not the business of the Secretary of Labor to write job evaluation systems." Id. Accordingly, under the Equal Pay Act, Congress "did not authorize the Secretary or the Courts to engage in wholesale re-evaluation of any employer's pay structure in order to enforce their own conceptions of economic worth." Brennan v. Price William Hospital Corp., 503 F.2d 282, 285 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

There is no legislative indication that in enacting the Civil Rights Act of 1964 Congress intended to reject all of its work and to abandon the limitations it had just one year previously placed upon wage discrimination claims in which the federal courts were to become involved. As discussed above, the Senate and the House took measures to preserve the equal work standard in Title VII by adopting the Bennett Amendment. But the point here is that where

Congress has thoroughly deliberated and meticulously drafted a statute reflecting its judgment on a specific area, that judgment will control the interpretation of a more general later enactment absent a clear statement to the contrary in the subsequent statute. United Continental Tuna, supra; Colorado Pub. Int. Group, supra.

The Ninth Circuit's construction of Title VII herein authorizes an evasion of the policy and regulatory scheme of the Equal Pay Act and in effect repeals the Equal Pay Act by implication. However, since there is no Congressional intent authorizing Title VII plaintiffs to evade the Equal Pay Act and its standard, the court of appeals' construction of Title VII is in conflict with the decisions of this Court. United Continental Tuna, supra; Colorado Pub. Int. Research Group, supra.

## III. THE COURT OF APPEALS INCORRECTLY DECIDED THE QUESTION POSED FOR REVIEW

The court of appeals misconstrued the terms of the Bennett Amendment.

(3a-18a). The court of appeals reasoned that the use of the word "authorized" literally meant that the Bennett Amendment only incorporated the Equal Pay Act's affirmative defenses because the Equal Pay Act "'authorizes' a differential only where one of the four defenses is invoked" (9a). However, the court of appeals improperly selected a meaning for "authorized" that best suited its view of what the ultimate result should be, and disregarded other common meanings of the word and the legislative purpose for the Bennett Amendment. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, 326 U.S. 404 (1945). "Authorized" also means "to permit a thing to be done in the future", Black's Law Dictionary (4th ed. 1968), at 169, and when the word is viewed under that meaning the Bennett Amendment "authorizes" differentials in pay in situations not involving equal work. Even if the term is limited to a meaning signifying express sanction or endorsement, the carefully considered decision of Congress to limit the application of the Equal Pay Act to circumstances involving equal work was a conscious authorization

of unequal pay in all circumstances involving unequal work, including the category of comparable work for which protection was rejected.

The court of appeals herein largely confined itself to the bare words of the statute and improperly ignored legislative history. Lynch v. Overholser, 369 U.S. 705, 710 (1962).[10] And although the Ninth Circuit did review some of the relevant Title VII legislative history, it misinterpreted the import of, or failed to accord sufficient weight to, the Congressional intent to incorporate the equal work standard into Title VII. For example, early in the Senate debate of H.R. 7152, Senator Clark, a floor manager of the bill, submitted a memorandum in the course of responding to objections that had been raised to the bill which the sponsors of the bill considered to be unfounded. One unfounded objection stated that H.R. 7152 did not include the limitation of the Equal Pay

10 The court of appeals did not discuss any of the legislative history of the Equal Pay Act which shows Congress' intent just one year prior to the passage of Title VII to limit broad inquiry by the courts in the wage area.

Act "with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut[s] across different jobs." 110 Cong. Rec. 7217 (1964). Senator Clark responded that "[t]he standards in the Equal Pay Act for determining discrimination as to wages of course, are applicable to the comparable situtation under Title VII." Id. (Emphasis added).[11]

The court of appeals incorrectly held that Senator Clark meant that when a Title VII plaintiff asserts an equal work claim, the equal work standard applies, but for claims not involving equal work, the equal work standard does not apply (17a-18a). Under the Ninth Circuit's analysis Senator Clark was agreeing that wage discrimination claims under Title VII would "cut across different jobs." But the purpose of Senator Clark's memorandum, as floor manager, was to reply to unfounded objections to the bill, not to raise objections he agreed with. In fact, Senator

11 The full text of the pertinent unfounded objection and Senator Clark's answer are set forth in the court of appeals' supplemental decision (6a-7a).

Clark was disagreeing with the objection and stating that Title VII would not allow claims which "cut across different jobs" because of its in pari materia relationship with the Equal Pay Act's equal work standard.

Moreover, the court of appeals misinterpreted Senator Bennett's comments. Senator Bennett offered his amendment because of his stated concern that perhaps not enough attention had been paid to potential conflicts between H.R. 7152 and the Equal Pay Act due to the "wholesale" insertion of the word "sex" in the bill. 110 Cong. Rec. 13647 (1964). Senator Bennett said: "[t]he purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified". Id. The court of appeals' interpretation of Senator Bennett's comments -- that Senator Bennett intended to incorporate only the Equal Pay Act's affirmative defenses into Title VII -- renders the Bennett Amendment meaningless since such affirmative defenses were already contained in H.R. 7152 in the first sentence of Section 703(h).[12] The court of appeals was

apparently unaware of the importance of the first sentence of §703(h) when it initially decided this case, but its subsequent discussion of the matter in the Supplemental Opinion denying rehearing is not persuasive.[13]

[12] The opening sentence of §703(h) already protected compensation which is based on a seniority system, a merit system or a system which measures earnings by quantity or quality of production. The fourth Equal Pay Act defense, a "factor other than sex," was already contained in the core provisions of Title VII (Section 703(a)) which make Title VII applicable only if there is discrimination on the basis of sex, 42 U.S.C. §2000e-2(a). Sections 703(a) and 703(h) of Title VII are set forth in the appendix hereto (80a).

[13] The court of appeals implied that it makes no difference whether the Bennett Amendment is rendered meaningless because nothing in §703(h) was meant to have a "substantive" effect on the anti-discrimination prohibitions of Title VII. (10a). That statement is clearly incorrect, as shown by this Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The court of appeals also ignored this Court's reliance on an interpretation of the equal work standard in General Electric, supra, which shows that the Bennett Amendment was intended to have a substantive effect. The Ninth Circuit's statement (10a) that the Bennett Amendment (cont.)

Cloture limited the time Senator Bennett had to introduce the Bennett Amendment. But he later clearly explained that the Bennett "amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965). At the time of Senator Bennett's more complete explanation of intent, Senator Dirksen stated that he, Senator Humphrey (a floor leader of H.R. 7152) and the Senate as a whole passed the Bennett Amendment in accord with Senator Bennett's understanding of the Amendment. 111 Cong. Rec. 13360 (1965). The court of appeals improperly failed to accord weight to these expressions of Congressional intent.[14]

(cont.) clarifies the inclusion of the affirmative defenses is not persuasive since the affirmative defenses had already been included by the first sentence of §703(h). Finally, the court's statement (11a) that the Bennett Amendment clarified the burden of proof in an equal pay-type case filed under Title VII is not supported by the Bennett Amendment or any legislative history.

14 The court of appeals would not rely on the 1965 statement of (cont.)

(5a-6a).

Additionally, the court of appeals erred with respect to Congressman Celler's interpretation of the Bennett Amendment. Congressman Celler, the original sponsor of H.R. 7152, provided the official and only explanation of the

(cont.) Senator Bennett because it was not contemporaneous with the passage of Title VII (5a-6a). However, Senator Bennett could not explain the Bennett Amendment when it was offered because of the invocation of cloture. And he did make his later statement shortly after the enactment of Title VII. This Court has accorded weight to non-contemporaneous legislative statements. E.g., Sioux Tribe v. United States, 316 U.S. 317, 329-330 (1942); Haynes v. United States, 390 U.S. 85 (1168). The Court's decision in Galvan v. Press, 347 U.S. 522 (1954), is incorrectly interpreted by the court of appeals (5a). Galvan supports the view that Senator Bennett's 1965 statement is entitled to great weight since he was the sponsor of the Amendment. In Galvan, supra, this Court relied upon a 1951 memorandum by Senator McCarran in interpreting the meaning of a 1950 statute he sponsored. 347 U.S. at 526-27. Accordingly, the court of appeals erred by not according weight to the 1965 statements of Senator Bennett and Senator Dirksen. (Senator Dirksen's 1965 statement was not even discussed by the court of appeals). Those statements make clear that the purpose of the Bennett Amendment was to incorporate the equal work standard into Title VII.

Bennett Amendment to the House by stating that the Bennett Amendment "[p]rovides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex -- section 703(b) [sec] [703(h)]".[15] 110 Cong. Rec. 15896 (1964). While the court of appeals recognized that Congressman Celler's explanation did not support its interpretation of the Bennett Amendment, it decided not to follow that clear statement of legislative intent "in view of the contrary or inconclusive legislative history previously discussed." (8a). However, as shown above, there is no contrary legislative history. Congressman Celler's explanation is entitled to great weight because (1) it was made by the sponsor of the legislation who obviously understood its provisions, including the amendments, and (2) the House passed the bill based on Congressman Celler's explanation of the bill. United States v. United Mine Workers,

15 The Equal Pay Act is contained in the Fair Labor Standards Act, 29 U.S.C. §206(d).

330 U.S. 258, 279-80 (1947); Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

The court of appeals also erred by misreading the EEOC's contemporaneous interpretation of the Bennett Amendment. In 1965, shortly after the Equal Pay Act and Title VII were enacted, the EEOC promulgated the following official guideline concerning the inter-relationship of the two laws (formerly codified at 29 C.F.R. §1604.7, quoted in pertinent part):

> "(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 205(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of equal pay for equal work set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibition in section 703, and is not limited by

> section 703(h) to those employees covered by the Fair Labor Standards Act." (Emphasis supplied).[16]

The court of appeals did not even discuss the key second sentence of the EEOC's 1965 guideline. The court of appeals also erred by interpreting the guideline to mean that the equal work standard only applies when a plaintiff alleges an equal pay violation under Title VII. (37a). However, by its terms the EEOC guideline applied to all types of compensation claims -- not just "equal pay-type claims" -- because the reference to th equal work standard "determining what is unlawful discrimination in compensation" is not limited in any way.[17]

16 The Commission later tried to modify this view in 1972 by issuing a new interpretation of the Bennett Amendment, see, 29 C.F.R. §1604.8, but the earlier guideline is entitled to greater weight since it was more contemporaneous with the passage of Title VII. General Electric, supra, 429 U.S. at 142.

17 The court of appeals' approach is fundamentally inconsistent. It held that the Bennett Amendment did not incorporate the equal work standard into Title VII. However, when confronted with authority such as Senator (cont.)

## IV. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The issue raised herein is considered to be extremely important by the government, employers and unions. The Chairwoman of the Equal Employment Opportunity Commission has stated that the issue is "the same kind of outsized issue that school desegregation was", the "most difficult issue to arise under Title VII" and the "women's issue of the 1980's". See BNA Daily Labor Report dated October 30, 1979, at A-2, A-3. At recent EEOC hearings, representatives of business, labor and public employers

(cont.) memorandum and the 1965 EEOC guideline, the court of appeals held that the equal work standard is applicable to Title VII, but only for equal pay-type claims (38a-39a). Moreover, the court of appeals held that the respondents had stated a claim under Title VII by alleging a pay disparity which obviously involved a comparison of two different jobs (39a). Yet, the court of appeals stated that the "effect of our decision will not be to substitute a 'comparable' work standard for an 'equal' work standard" (17a). These inconsistencies reveal confusion in the Ninth Circuit's reasoning requiring review by this Court.

stressed the importance of the standard of proof to be applied to Title VII sex-based wage discrimination claims.[18] Accordingly, the interest in the question raised in this petition goes far beyond the parties involved herein.

The decision below has enormous impact on the federal courts. In the instant case, the district court has been instructed to consider respondents' claim that the Matron job is discriminatorily underpaid when compared to the different Corrections Officer job allegedly because the pay differential between the jobs is greater than differences in difficulty between the jobs. (18a). Resolving such a claim would entail complex questions of job evaluation -- and would result in the district court imposing on the parties its conception of the economic value of the jobs.[19] This process would overburden

18 See BNA Daily Labor Report dated April 28, 1980 at A-14; BNA Daily Labor Report dated April 29, 1980 at A-5 to A-12 and BNA Daily Labor Report dated April 30, 1980 at A-8 to A-15.

19 See, Lindsay, Equal Pay (cont.)

the courts because the courts simply do not have the experience and expertise of employers and unions in the job evaluation area. Moreover, the decision below will result in numerous Title VII suits being filed, creating a significant burden on the courts not intended by Congress.[20]

(cont.) for Comparable Work: An Economic Analysis of a New Anti-discrimination Doctrine (1980), published by the Law and Economics Center of the University of Miami. Professor Lindsay cautions against the "[a]rbitrary mainipulation of wage rates" and reasons that governmental interference in the wage area could result in "counterproductive effects", such as an overall loss of jobs. Id. at 33-34. Moreover, Professor Lindsay concluded that "wage determination in different occupations is a complex, simultaneous process" and that "even in the absence of prejudice, and when performed under conditions of equal skill, effort, and responsibility, the real market value of dissimilar work can differ markedly." Id. at 3-4. The fact that wage rates depend on so many complex factors was one of the prime reasons for the creation of the equal work standard -- to limit federal involvement in the wage area except in equal work situations.

20 There already has been a substantial amount of Title VII wage discrimination litigation notwithstanding the fact that the courts have generally

The decision below also raises the possibility of enormous financial consequences to individual employers and the economy as a whole.[21] With respect to

(cont.) rejected claims not meeting the equal work standard. See the cases cited supra at 11 et seq., which represent only a portion of the suits alleging wage discrimination under Title VII. If the equal work standard would not apply as a limitation on Title VII sex-based wage discrimination claims, the amount of such litigation surely would increase.

21 In discussing these economic consequences, Fortune Magazine observed:

> There are two ways to correct the imbalance in earnings [between the sexes]. Women can step into higher-income jobs, a commendable process that is, of course, gradually taking place. But if the world could be changed by edict, there is a second method that would work much faster. Women could remain in their customary jobs and men in theirs and employers could be ordered to pay the same wages to all whose work is deemed to be of equal value.
>
> That would certainly correct imbalances rapidly, but the economy would surely be much disrupted in the process. At the extreme, to raise the aggregate pay of the country's (cont.)

the County and other local public employers dependent upon a limited tax base for sources of revenue, the potential financial impact of the federal courts adjusting wage rates under the court of appeals' novel approach in this case is very troublesome, particularly since this Court has not approved the court of appeals' approach herein.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted
Lawrence R. Derr

(cont.) 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering $150 billion a year to civilian payrolls. Such a radical step, of course, seems too preposterous to be taken seriously . . . . "The EEOC's Bold Foray Into Job Evaluation," Fortune, September 11, 1978, 58-59.

# APPENDIX

Supplemental Opinion of the
Court of Appeals
(Decided May 1, 1980)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, YVONNE M. HATTON, Plaintiffs-Appellants, | No. 76-3448 |
| vs. | SUPPLEMENTAL OPINION ON DENIAL OF REHEARING |
| THE COUNTY OF WASHINGTON: SHERIFF WARREN BARNES, in his capacity as Sheriff of Washington County; CAPTAIN STAN FRIESE and SERGEANT CLARENCE RAMSETH, in their capacities as Washington County Police Officers, Defendants-Appellants. | |

Appeal from the
United States District Court
for the District of Oregon

Before: MERRILL and TANG, Circuit Judges and TAYLOR,* District Judge.

TANG, Circuit Judge:

After our opinion in this matter was filed, Gunther v. County of Washington, No. 76-3448 (9th Cir., filed August 16, 1979), the County petitioned for rehearing, and the Equal Employment Advisory Council (EEAC), an association representing the interests of employers submitted an amicus curiae brief in support. The County now argues that rehearing is necessary because the panel decided an important issue -- whether Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-1 - 2000e-17 (1976), may support a theory of sex-based wage discrimination that is not based on a denial of equal pay -- with minimal discussion of the issue by the parties. The County and the EEAC contend that the panel overlooked legislative history and case law that would have led it to conclude that discrimination in compensation on

*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

account of sex does not violate Title VII unless it also violates the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1970).

It is true that the parties inadequately presented this issue before the court. Nevertheless, the issue was raised at trial, decided by the district court, and raised on appeal. We are thus obliged to reach the issue. Nevertheless, we take this opportunity to address briefly the arguments made in the petition for rehearing.

I.

The County and the EEAC first contend that the panel overlooked significant legislative history of Title VII in resolving the meaning of the Bennett Amendment. Of the three short items of legislative history that they present, the one on which they most rely is the statement of Senator Bennett, the amendment's sponsor, in which he endorses the interpretation of the amendment that we rejected in Gunther. 111 Cong. Rec. 13359 (1965).

Senator Bennett's statement is an interesting piece of "legislative history." The Bennett Amendment was passed in 1964 as part of the original Civil

Rights Act. One year later, Senator Bennett inserted in the Congressional Record an excerpt from a law review article in which the article's author suggests that there are two conflicting interpretations of the Bennett Amendment (the same two recognized by the panel), plus a memorandum from his staff to clarify which interpretation Bennett believed to be the correct one. The memorandum concluded that "the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." Id.

Before inserting the article and the memorandum, Senator Bennett explained why he waited a year to explain what he really meant when he introduced his amendment. According to Senator Bennett, under the Senate rules then in effect he was allowed to introduce the amendment but was not allotted time to discuss it. Senator Bennett said that this

> resulted in action by the Senate without the creation of any legislative history. Thus, the Senate failed in its responsibility to give sufficient guidance to those in the executive

> branch and elsewhere to those who must interpret and apply the amendments adopted.
>
> As an example of what has occurred because of the confusion and near chaos that prevailed on those days, I find myself today under the necessity of trying to create legislative history that should have been created then.

As the amendment's sponsor, Senator Bennett's understanding of the amendment might have been entitled to some weight if it had been expressed contemporaneously with the passage of the legislation. See Galvan v. Press, 347 U.S. 522, 526-27 (1954). Coming one year after the Bennett Amendment was enacted, however, the statement at best reflects what was on Senator Bennett's mind when he introduced the amendment and is entitled to no weight. See Manhart v. Los Angeles Department of Power and Water, 553 F. 2d 581, 589 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978) (discussion occurrring "hours" after passage of Bennett Amendment is not part of amendment's legislative history). Either from a legal standpoint or as a

practical matter, Senator Bennett's statement cannot express what was on Congress' collective mind when it acted a year earlier. If Senator Bennett's "clarifying" statement has any significance, it must be as evidence that the amendment was ambiguous on its face and that its contemporaneous legislative history was not enlightening.

The second item of legislative history produced by the County and the EEAC also tends to support the panel's original interpretation. This consists of an answer by Senator Clark, a proponent of Title VII, to objections against the proposed legislation:

> Objection: The sex anti-discrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be

> classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.

110 Cong. Rec. 7217 (1964).

Senator Clark's response is entirely compatible with the court's opinion. Senator Clark's comment that the Equal Pay Act contained different coverage and numerous exemptions reflected an understanding that the Equal Pay Act was to operate separately and independently from Title VII. See Gitt and Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections under Title VII, 8 Log. 723, 746-48 (1977) (hereafter "Beyond the Equal Pay Act"). His comment that the Equal Pay Act standards are applicable to the "comparable situation" under Title VII is consistent with the panel's analysis of the Gunther plaintiffs' discrimination claims. When a discrimination claim is based on a theory that the plaintiffs are denied equal pay for equal work, Equal Pay Act standards are applicable.

See Gunther, No. 76-3448, slip op. at 4-7 (9th Cir. August 16, 1979)). When a claim of discrimination is not based on an equal work theory, it must be analyzed separately under Title VII.

Finally, the County and EEAC refer to a comment made by Representative Celler in explaining a number of amendments made by the Senate to Title VII:

> Provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex -- section 703(b).

110 Cong. Rec. 15896 (1964). Viewing this solitary comment in its most favorable light, we find that it is insufficient to establish the County's interpretation of the Bennett Amendment in view of the contrary or inconclusive legislative history previously discussed.

The County and the EEAC next refer to the statutory language of §703(h). They argue that, because the first sentence of § 703(h) contains three of the four affirmative defenses contained in the Equal Pay Act, an interpretation that the Bennett Amendment merely

incorporated the Equal Pay Act defenses into Title VII renders the amendment meaningless.

Initially, it bears emphasis that the language of the Bennett Amendment, allowing a wage differentiation if such differentiation is "authorized by the provisions" of the Equal Pay Act, almost compels the interpretation that the Bennett Amendment merely incorporate only the Equal Pay Act's defenses into Title VII. The Equal Pay Act applies only when a plaintiff has been denied equal pay for equal work, and "authorizes" a differentiation only where one of the four defenses is invoked. The Equal Pay Act does not "authorize" differentiations in the absence of equal work; in those cases, it simply does not apply. Read literally, the amendment only incorporates the Equal Pay Act's defenses. If Congress had intended to say that wage differentials do not violate Title VII unless they violate the Equal Pay Act, it could have easily said so.

With this in mind, the County's reliance on the defenses included in the first sentence of § 703(h) cannot, and

does not, alter the meaning of the words used in the Bennett Amendment itself. The County argues that the panel's interpretation had no substantive effect because three of the Equal Pay Act defenses were already included in Title VII. Yet the very inclusion of the three affirmative defenses in the first sentence of § 703(h) made no substantive alteration of Title VII. These defenses merely clarified Congress' intent that only discrimination on account of race, color, religion, sex, or national origin is forbidden by Title VII. See 110 Cong. Rec. 12722 (1964) (remarks of Sen. Humphrey). Similarly, the Bennett Amendment need not have effected a "substantive" change. It does not render the Bennett Amendment meaningless to say that it only incorporates the Equal Pay Act defenses, because the Bennett Amendment would still serve the purpose of clarifying Congress' intent with respect to the relationship of Title VII and the Equal Pay Act.

Moreover, the fact that the Bennett Amendment incorporated an Equal Pay Act defense -- the defense allowing differentiation based "on any other factor

other than sex" -- that is not contained in the first sentence of § 703(h) is significant. The incorporation of this Equal Pay defense into Title VII clarifies the burden of proof in an equal pay case brought under Title VII. Under the Equal Pay Act, the burden is on the employer to show that its practice falls within one of the four defenses. See Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974). The incorporation of the fourth affirmative defense into Title VII makes clear that once a Title VII plaintiff has shown that she was denied equal pay for equal work, the burden shifts upon the employer to prove that the differentiation was based on some factor other than sex.[1]

The County and the EEAC next contend that the panel ignored significant case law in arriving at its interpretation of the Bennett Amendment.

Although we look to the reasoning of other circuits and district courts for guidance, we are bound only by decisions rendered in this circuit. See Allstate Insurance Co. v. Stevens, 445 F. 2d 845. 846 (9th Cir. 1971). The only case

arising from this circuit that discussed the Bennett Amendment was Manhart v. City of Los Angeles Department of Water and Power, 553 F.2d 581 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978). Although the court did not address the present issue, it was obliged to address the Bennett Amendment and the Equal Pay Act affirmative defenses in the context of suit brought under Title VII to challenge a retirement plan. The court specifically noted, in discussing the Equal Pay Act's affirmative defenses, that "all that the Bennett Amendment did was to incorporate the exemptions of the Equal Pay Act into Title VII." Id., 553 F.2d at 590. Although arising in a different context, the express language of this circuit cannot be readily disregarded. Nevertheless, discussion of case law in other circuits and district courts may be enlightening in showing the ambiguity and confusion that has often characterized consideration this issue.

The only appellate case that has specifically recognized the relationship between Title VII, the Equal Pay Act and

the Bennett Amendment is Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977). In Christensen, however, the majority opinion specifically declined to address whether Title VII plaintiffs had to prove a violation of the Equal Pay Act to succeed on their equal pay claims, finding that the plaintiffs had not established a prima facie case under Title VII. Id. at 355.

Other courts, although sometimes assuming or implying that a Title VII plaintiff could not succeed on her wage-discrimination claim unless she could prove a violation of the Equal Pay Act, have involved equal pay-type claims. See Orr v. MacNeill & Son, Inc., 511 .2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia, 448 F.2d 117 (10th Cir. 1971). These equal-pay type Title VII claims, of course, require analysis under Equal Pay Act standards. See Gunther, No. 76-3448, slip op at 4-7 (9th Cir. August 16, 1979). Although the panels in both Orr and Ammons appeared to assume that a Title VII plaintiff claiming wage discrimination could prevail only if she proved a violation of the Equal Pay Act,

in neither case did the court analyze the meaning of the Bennett Amendment and its effect on the relationship between the Title VII and the Equal Pay Act. See Gitt and Gelb, Beyond the Equal Pay Act at 752-55. This assumption that a Title VII plaintiff could prevail only by establishing an equal pay violation has been perpetuated in later cases involving only equal pay claims, where statements limiting the scope of Title VII were unnecessary to decide the case.

The failure of the courts to analyze the meaning of the Bennett Amendment and the relationship of the two acts has resulted in an inconsistent approach that underscores the ambiguity of the Bennett Amendment. If the Bennett Amendment really means, as the County contends, that a plaintiff claiming wage discrimination can succeed under Title VII only if the discrimination also violates the Equal Pay Act, then logically the Bennett Amendment should incorporate into Title VII not only the equal work formula of the Equal Pay Act, but also the Act's exemptions, employers, periods of limitations, and all other differences in coverage between

the acts.[2] Yet, not only have the courts and the County failed to articulate whether the Bennett Amendment incorporates the entire Equal Pay Act or just its equal pay formula, they have not even recognized that two extremely different formulations of their position exist.

Several of the district court cases cited by the County have exhibited this apparent inconsistency. For example, in Molthan v. Temple University, 442 F.Supp 448 (E.D. Pa. 1977), the district court considered equal pay claims under Title VII even though the claims would have been time-barred under the Equal Pay Act. In Howard v. Ward County, 418 F. Supp. 494, 503 (D.N.D. 1976), the court held that the plaintiffs could assert claims under Title VII even though, as public employees, they could not recover under the Equal Pay Act.

Indeed, the County's defense of this case suffers from the same inconsistency. The Gunther plaintiffs sued under Title VI because, during the time of their alleged discrimination, the Equal Pay Act did not apply to public employees. Gunther, No. 76-3448, slip

op. at 4 n.4 (9th Cir. August 16, 1976). Consistent with the position it now appears to advocate, the County should have moved to dismiss the plaintiff's suit on the ground that its conduct could not have violated Title VII because it did not violate the Equal Pay Act. The County's failure to do so reflects on the failure of the courts to analyze and articulate the meaning of the Bennett Amendment, as well as the ambiguous nature of the amendment itself. This court was certainly warranted in not following the inadequate analyses and assumptions perpetuated by other courts.

Finally, the County and the EEAC argue that the legislative history of the Equal Pay Act evidences Congress' intent carefully to establish standards against wage discrimination and that Congress could not have intended to disturb those standards when it hastily included sex in Title VII. This argument, however, cuts more forcefully in the other direction. The same Congress that enacted the Equal Pay Act enacted Title VII one year later. Thus, when the Congress included sex into

Title VII it was fully aware, from the previous year's hearings, of the employment problems of women. It may have believed that the Equal Pay Act by itself was inadequate to remedy sex discrimination, or that broader protections were necessary. See Gitt and Gelb, Beyond the Equal Pay Act at 744-45.

In any event, our interpretation of the Bennett Amendment in Gunther does not "nullify" the provisions of the Equal Pay Act. The County and the EEAC emphasize that Congress, in adopting the Equal Pay Act, rejected "comparable" work standard. The effect of our decision will not be to substitute a "comparable" work standard for an "equal" work standard. Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. In most cases, an equal work theory will provide the most practical method of

establishing a prima facie case of wage discrimination. All we hold here is that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII. It is unnecessary to determine now what theories might be feasible. We do note that, because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficent to establish a prima facie case.

The Gunther plaintiffs apparently presented evidence of intentional sex discrimination that was not considered by the district court because the district court believed that disposition of the equal pay claims was the end of the inquiry. It is unclear from the record whether the plaintiffs were prevented from presenting other evidence that might have established a claim of sex discrimination. Because of the district court's familiarity with this case, the extent of the further proceedings needed to consider the plaintiffs'

alternative claims, such as the need for an evidentiary hearing, is committed to its discretion.

The petition for rehearing is denied.

FOOTNOTES

[1]For example, even if an employer could show that a sex classification was justified as a bona fide occupational qualification under Title VII, see 42 U.S.C. § 2000e-2(e), the employer might still be liable for a discriminatory wage differential if unable to prove that the differential was the result of any other factor other than sex. See Sullivan, The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case, 31 Ark. L.Rev. 545, 547 n.14 (1978).

[2]For example, the Fair Labor Standards Act exempts numerous employees from coverage under its provisions, see 29 U.S.C. § 213; no similar exemptions are contained in Title VII; see also Sullivan, The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case, 31 Ark. L.Rev. 545, 546 n. 9-13 (1976).

Opinion of the Court of Appeals
(Decided August 16, 1979)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, YVONNE M. HATTON, Plaintiffs-Appellants, | ) | No. 76-3448 |
| vs. | ) | OPINION |
| THE COUNTY OF WASHINGTON: SHERIFF WARREN BARNES, in his capacity as Sheriff of Washington County; CAPTAIN STAN FRIESE and SERGEANT CLARENCE RAMSETH, in their capacities as Washington County Police Officers, Defendants-Appellants. | ) | |

Appeal from the
United States District Court
for the District of Oregon

Before: MERRILL and TANG, Circuit Judges and TAYLOR,* District Judge.

TANG, Circuit Judge:

*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

Plaintiffs Alberta Gunther, Velene Vallance, Marion Vanderzanden, and Yvonne Hatton were four women employed as jail matrons[1] at the Washington County (Oregon) jail. The plaintiffs guarded the inmates in the female section of the county jail; males were employed at a higher rate of pay to guard the inmates in the male section. The jobs of the plaintiffs and two other matrons, Dorothy Holiday and Donna Firth, were terminated when the County decided to move the women prisoners into a facility in an adjacent county.

The plaintiffs sued the County Sheriff Warren Barnes, Captain Stan Friese, and Sergeant Clarence Ramseth[2] under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-1--2000e-17 (1976) ("Title VII"); Holiday and Firth did not sue. Generally, the plaintiffs alleged that the defendants denied them equal pay for equal work and that the defendants terminated them, and later refused to rehire them, in retaliation for their demands for equal pay.

The district court segregated the issues of liability and damages. The

liability issue was tried to the court on the basis of depositions, witness summaries, exhibits and testimony. The court entered judgment for the defendants on the merits.

On appeal, the plaintiffs contend (1) they were denied equal pay for work substantially equal to that performed by male guards, and even if the work was not substantially equal, some of the discrepancy in pay can be explained only by sex discrimination; and (2) the defendants retaliated against plaintiffs for asserting equal pay demands by abolishing their jobs, by forcing Vanderzanden to resign, by noting on personnel forms they would not rehire the plaintiffs, and by refusing to rehire Vallance. We affirm in part, reverse in part, and remand for further proceedings.

I

Discriminatory Compensation

Prior to June 1973, the male section of the jail was staffed by male deputy sheriffs. The deputy sheriffs were assigned to jail duties on a temporary basis only, as part of their training, for periods ranging from several days to

one-year. In February 1973, the pay range for a matron was $525-$668; for a deputy sheriff, $736-$940; for a deputy sheriff recruit, $668-812.

Beginning in late June 1973, the deputy sheriffs were replaced by the position of corrections officers. The corrections officers were assigned to the jail on a permanent basis, and the position was open to both males and females. In February 1973, the salary range for a correction officer was $701-896; the range for a correction officer trainee was $668-812.

The district court found that, although the matrons' jobs may have required as much skill as those of the male guards, the matrons' jobs did not require equal effort or responsibility.[3] The court found that the men and women had substantially different workloads. The men and women worked in separate quarters and the male jailers guarded more than ten times as many prisoners as each matron. Unlike the men, the matrons, because they had fewer prisoners to guard, devoted a significant portion of their working time to clerical duties which all parties agreed

was less valuable work. Having determined that the work was not substantially equal, the district court stated "that is the end of the inquiry," and disregarded the plaintiffs' claim that some of the discrepancy in their pay was due to sex discrimination.

The plaintiffs dispute these findings. They contend that they were denied equal pay because the male jailers were paid more even though they and the males both performed substantially equal work. Plaintiffs further contend that, even if the work was not substantially equal, the defendants nevertheless violated Title VII if some of the difference in salary between the plaintiffs and the male guards can be attributed to sex discrimination. In order to evaluate these contentions, we must first consider the interrelationship of Title VII and the Equal Pay Act.[4]

A. The Equal Pay Claim

Under the broad coverage of Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice to discriminate against an individual with respect to compensation on the basis of

the individuals' sex. Section 703(a)(1), codified as 42 U.S.C. §2000e-2(a)(1). The Equal Pay Act, § 206(d) of the Fair Labor Standard Act, 29 U.S.C. § 206(d), while specifically designed to prohibit discrimination based on sex in the area of compensation, is somewhat narrower in language. The Equal Pay Act prohibits an employer from discriminating "between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill effort and responsibility, and which are performed under similar working conditions . . ."[5] The Act provides four affirmative defenses by which an employer can avoid liability despite proof of unequal pay for equal work.

It is plain that the Equal Pay Act overlaps with the coverage of §703(a)(1) of the Civil Rights Act. See, e.g., Shultz v. First Victorian National Bank, 420 F.2d 648, 659 n.26 (5th Cir. 1969). Both statutes serve the same fundamental purpose of remedying inequality in the

area of compensation, and where an equal pay claim has been raised under either or both statutes, the courts have held that the statutes should be construed harmoniously. Id.; DiSalvo v. Chamber of Commerce, 568 F.2d 593, 596 (8th Cir. 1978). As a result, courts have looked to decisions interpreting the Equal Pay Act for guidance in examining equal pay claims asserted under Title VII. See, e.g. Hays v. Potlatch Forests, Inc., 465 F.2d 1081, 1083 (8th Cir. 1972).

Generally, the Equal Pay Act requires that women receive "equal pay for equal work." See., e.g., Brennan v. Prince William Hospital Corp., 503 F.2d 282 (4th Cir. 1974), cert. denied 420 U.S. 972 (1975). Under the Act, the plaintiffs have the burden of proving that they did not receive equal pay for equal work. E.g., Christopher v. State of Iowa, 559 F.2d 1135, 1138 (8th Cir. 1977). They are not required, however, to show that the jobs performed are identical. Peltier v. City of Fargo, 533 F.2d 374, 377 (8th Cir. 1976); Usery v. Allegheny County Institutions District, 544 F.2d 148, 153 (3rd Cir. 1976). Instead, the plaintiffs may

prove a violation of the Equal Pay Act by showing that the skill, efforts, and responsibility required in the performance of the jobs is "substantially equal." Usery v. Columbia University, 568 F.2d 953, 958 (2d Cir. 1977); Ridgeway v. United Hospitals - Miller Division, 563 F.2d 923, 926 (8th Cir. 1977). To make this showing, actual job performance and content--not job titles, classifications or descriptions--is determinative. See Katz v. School District of Clayton, Missouri, 557 F.2d 153, 156 (8th Cir. 1977); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1171 (3d Cir. 1977). It is the overall job, not its individual segements, that must form the basis of comparison, see Usery v. Richman, 558 F.2d 1318, 1320 (8th Cir. 1977), and, because job duties vary so widely, each suit must be determined on a case-by-case basis. Brennan v. Prince William Hospital Corp., 503 F.2d 282 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

We apply the "clearly erroneous" standard of review in determining whether the district court correctly found that the jobs were not substan-

tially equal. Fed. R. Civ. P. 52(a); see DiSalvo v. Chamber of Commerce, 568 F.2d 593, 596-97 (8th Cir. 1978). Our review of the record convinces us that the district court's finding on this issue was not clearly erroneous.

The district court relied heavily on two factors in making its determination: the amount of clerical work performed by the matrons and the prisoner/guard ratio. The record supports the district court's finding that each jailer was responsible for guarding a substantially greater number of prisoners than each matron. Over a six-month period from April to September 1973, the booking records show that the female prisoner population averaged 1.85 inmates per day. The average daily staff of matrons was about 5.5 matrons. Therefore, approximately three matrons were employed for each woman prisoner. In contrast, the average daily staff of 13 male jailers guarded, on the average, between 50 and 60 male inmates per day, or roughly 4 inmates for every guard. In other words, comparing the male and female prisoner/guard ratio, a male guard was typically responsible for 12

times as many prisoners as a matron.[6]

The record likewise supports the district court's conclusion that the matrons did substantially more clerical work than the male guards.[7] Because they had fewer prisoners to guard, the matrons were assigned to do clerical work when they had no other work to perform. As a result, they performed substantial clerical work on every shift, including clerical work relating to the male prisoners. Often this work consumed as much as 50% of their working time. In contrast, the males spent very little time performing clerical work which at most pertained to the booking of male prisoners. The plaintiffs do not seriously dispute that clerical work entails substantially less effort and responsibility than guarding prisoners.

The plaintiffs argue that the amount of clerical work and the prisoner-guard ratios were "insignificant" differences that did not justify the wage differentials. According to the plaintiffs, the clerical work was only incidental to their primary duties; the prisoner/guard ratio exaggerates the amount of the males' responsibilities, because the

presence of a guard is required no matter how many prisoners there are.

The record, however, supports the conclusion that the greater amounts of clerical work and different prisoner/guard ratio makes the position of male guard qualitatively different that the position of matron. The fact the each male guard was required to guard more than ten times as many prisoners as his female counterpart makes a meaningful difference. As the defendants point out, more is required of a prison guard than making sure the cell doors remain locked. Frequent contact between the prisoners and the guard is necessary, and the district court properly concluded that the male guard was forced to exert significantly greater effort and was given signficantly greater responsibility because of the much greater number of prisoners for which he was responsible. For these reasons, the district court was not clearly erroneous by concluding that the work was not substantially equal.

B. Discriminatory Compensation Claims Not Based on a Demand for Equal Pay.

If the plaintiffs' Title VII claim

was simply a claim that they were denied equal pay for equal work, our inquiry would stop here. The plaintiffs argue more than this, however. They contend that even if their jobs were not substantially equal to those of the male jailers, they should be allowed to prove that some of the discrepancy in wages was due to sex discrimination. Implicitly, they argue that Title VII is broader in scope than the Equal Pay Act with respect to discriminatory compensation claims.

Despite the apparent importance of this question, we have found no reported appellate decision that has considered whether Title VII is broader in scope than the Equal Pay Act in this regard. The cases considering the relationship between Title VII and the Equal Pay Act have involved claims that females were being denied equal pay for equal work. See, e.g., Di Salvo, 568 F.2d 593; Orr, 511 F.2d 166. Quite properly, these cases have construed the two statutes harmoniously; any other approach may have produced different results depending on whether a plaintiff labeled his cause of action as being brought under

"Title VII" or under the "Equal Pay Act." These cases did not involve a situation where, as here, the plainiffs claimed they were compensated discriminatorily even if they did not perform equal work. We conclude that Title VII is broader in scope than the Equal Pay Act; however, the resolution of this issue requires a close analysis of the relationship between the two statutes.

The Equal Pay Act, as discussed, applies only to situations where a plaintiff contends there has been a denial of equal pay for equal work. It does not apply, for instance, where the plaintiff is performing comparable (but not substantially equal) work, or where a position held by the plaintiff is unique, see Rinkel v. Associated Pipeline Contractors, 17 FEP Cases 224, 226 (D. Alas. 1978). In contrast, the language of §703(a)(1) is much broader than that contained in the Equal Pay Act. Title VII, however, is not silent on its relationship with the Equal Pay Act. An amendment to § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), commonly known as the Bennett Amendment, provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of the [the Equal Pay Act].

Two interpretations of the Bennett Amendment are plausible. The Bennett Amendment can be interpreted to incorporate the Equal Pay Act's equal work formula into Title VII. Under this construction, Title VII and the Equal Pay Act would be coextensive in the area of sexually discriminatory compensation and a plaintiff could prove a violation of Title VII only if discriminatory compensation also violated the Equal Pay Act. Alternatively, the Bennett Amendment can be construed as simply incorporating the Equal Pay Act's four affirmative defenses, but not its equal work standard, into Title VII's prohibition. We find the latter interpretation more persuasive.

The relevant legislative history, although sparse, is enlightening. The prohibition against sex discrimination in Title VII was included only shortly

before the passage of the Civil Rights Act. As a result, the legislative history behind the sex discrimination component of Title VII is "notable only for its brevity." General Electric v. Gilbert, 429 U.S. 125, 143 (1976). See Manhart v. Los Angeles Department of Water and Power, 553 F.2d 581, 587 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978). Because sex was included in Title VII at the last minute, Senator Bennett became concerned that it might conflict with the Equal Pay Act. He proposed his amendment from the Senate floor. The complete "legislative history" of the Bennett Amendment is set out in the margin.[8]

Although scant, this dialogue, if anything, supports the interpretation that, Title VII incorporated the Equal Pay Act's four affirmative defenses but not its equal pay formulation. There is no indication that Congress, by the passage of the Bennett Amendment contemplated that the amendment would apply to the kind of situation now before us. Senator Bennett's comment that the purpose of the amendment was

"to provide in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified," 110 Cong. Rec. 13647 (1964), most likely referred to the potential for conflict that would arise if the four affirmative defenses contained in the Equal Pay Act were not included in Title VII. Senator Dirksen's remark that "[a]ll that the pending amendment does is recognize these exceptions, that are carried in the basic act," id., appears to be to the same effect.

Language in Manhart v. City of Los Angeles Department of Power and Water, 553 F.2d 581 ((th Cir. 1977), also supports our conclusion that the Bennett Amendment was designed to incorporate only the Equal Pay Act's four affirmative defenses. In Manhart, the plaintiffs challenged a retirement plan requiring greater contributions from women under §703 of the Civil Rights Act. In noting that such a plan was unaffected by any of the Equal Pay Act's affirmative defenses, we said "all that the Bennett Amendment did was to incorporate the exemptions of the Equal Pay Act into Title VII," Manhart, 553

F.2d at 590. See Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 446 (D.C. Cir. 1976), cert. denied 434 U.S. 1086 (1978) ("a sex-predicated wage differential is immune from attack under Title VII only it if comes within one of the four enumerated exceptions to the equal pay act.")

Moreover, the broad remedial policy behind Title VII persuades us that Title VII's plain language should not be limited further in the absence of a clear Congressional directive. Legislative enactments in the area of job-related discrimination have long evinced a general intent to accord parallel or overlapping remedies. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Accordingly, the rights created under Title VII are independent of the rights created by other statutes. Laffey, 567 F.2d at 445. If we were to limit Title VII's protection against sexually discriminatory compensation practices to those covered by the Equal Pay Act, we would in effect insulate other equally harmful discriminatory practices from review.[9]

There is some district court

authority that is contrary to our interpretations, see IUE v. Westinghouse Electric Corp., 19 FEP Cases 450 (D.N.J. 1979); Wetzel v. Liberty Mutual Insurance Co., 17 FEP cases 232 (W.D. Pa. 1978); Molthan v. Temple University, 412 F. Supp. 448 (E.D. Pa. 1977), but we do not find these decisions persuasive. Of these cases, only IUE gave substantial consideration to the issue before us. In support of its conclusion that Title VII and the Equal Pay Act are coextensive in this area, the court in IUE relied heavily on cases in which equal pay claims were brought under Title VII. See id. at 456. The general rule stated in the cases cited in IUE--that Title VII equal pay claims should be judged under Equal Pay standards--is compatible with the view we have taken. Those cases, however, did not consider the issue whether Title VII prohibits conduct outside the scope of the Equal Pay Act, and we see no reason to extend the rationale of those cases to a significantly different issue which they did not address.

The court in IUE also relied in part on the 1965 guidelines[10] promulgated

by the Equal Employment Opportunity Commission Id. at 455-56. See 30 Fed. Reg. 14927 (1965). To the limited extent that this guideline is authoratative, see General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976), we do not regard it as contradictory to our holding here. The guidelines acknowledged that §703(h) was designed to avoid conflicting interpretations "with respect to situations to which both statutes are applicable." Consistently, we hold that Equal Pay Act standards apply in Title VII suits when plaintiffs raise a claim of equal pay. When plaintiffs raise a claim under Title VII of discriminatory compensation in the absence of an allegation that they perform substantially equal work, no conflict with the Equal Pay Act arises because the Equal Pay Act is inapplicable.

In summary, we hold that, although decisions interpreting the Equal Pay Act are authoritative where plaintiffs suing under Title VII raise a claim of equal pay, plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices

unless the practices are authorized under one of the four affirmative defenses contained in the Equal Pay Act and incorporated into Title VII by §703(h).

We note that problems of proof may present substantial barriers to establishing this kind of discriminatory compensation claim. Such problems, however, are not sufficent reasons to foreclose the plaintiff from the opportunity to establish a claim of discrimination.

At trial, the plaintiffs offered evidence that a portion of the discrepancy between their salaries and those of the male guards could be ascribed only to sex discrimination.[11] We think that on remand the district court should consider this evidence.

II

The Retaliations Claims

A. Termination.

In December 1973, the County decided to board its prisoners at the Clackamas County Jail and, effective January 15, 1974, to replace the six matrons with two and one-half police stenographers.

The plaintiffs contend that the County abolished their jobs in retaliation for their claim for equal pay.

The district court found that the County's decision was motivated by legitimate, non-disciminatory objectives, because transferring the women prisoners and replacing them with male prisoners would make better use of jail space, and eliminating the matrons' positions would save money.

Under §704(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3, it is an "unlawful employment practice for an employer to discriminate against any of his employees. . . because he has opposed any practice made an unlawful employment practice by this subchapter . . ."

In order to establish a prima facie violation of this section, the plaintiffs must show more than that they protested practices contrary to Title VII and that they were subjected to adverse action by their employer. Miller v. Williams, 590 F.2d 317, 320 (9th Cir. 1979). The plaintiffs must also make a showing that links their conduct with the emmployer's action.

Id. Once the plaintiffs have made this showing, the defendants have the burden of establishing a legitimate, non-discriminatory reason for taking action adverse to the plaintiffs. Id.

The district court made no express finding whether the plaintiffs proved a prima facie violation of §704(a); it found only that the County had a legitimate reason for terminating the plaintiffs. On the record before us, it is questionable whether the plaintiffs showed a sufficent link between their demands for equal pay and the adverse actions taken against them to make a prima facie showing. Assuming arguendo that they have, we find that the district court was not clearly erroneous in determining the County's action was justified by legitimate, non-discriminatory reasons.

Sometime in mid-1973, Sheriff Barnes began receiving complaints from the American Civil Liberties Union (ACLU) about the overcrowded conditions in the men's section of the jail. On November 9, 1973 the ACLU filed a suit against the County seeking to correct these conditions.

The Sheriff's Office began to consider moving the female prisoners to a jail in one of the adjoining counties and eliminating the matron positions. In late November 1973, the undersheriff, Charles Sheratt, prepared a memo in which he determined that the county would save $18,000 a year by acting on the proposed changes. Barnes decided that the county could best alleviate the overcrowded conditions in the men's jail by moving the few female prisoners into a regional facility and moving in the men. There were sixteen cells in the women's prison and there were rarely more than three or four women prisoners in the prison at any given time. The County adopted Barnes' recommendation.

The district court determined that sound economic considerations justified the County's decision. The Court found that between 1971 and 1973, the number of male prisoners processed by the County jumped from 1,884 to 3,270. An increase in "weekend" sentencing, by which low-risk prisoners were allowed to serve time on weekends, aggravated the overcrowding. Conditions became so bad that prisoners were forced to sleep on

the floor.

In light of these conditions, we cannot dispute the district court's finding that the abolition of the plaintiffs' job resulted from the legitimate, non-discriminatory purposes of the defendants. Common sense dictated that they alleviate the overcrowding in the men's facility by eliminating the disproportionately more expensive women's facility.

B. Denial of Vanderzanden's Request for Leave of Absence.

In September 1974, Vanderzanden applied for a leave of absence without pay because she had become physically disabled. Sheriff Barnes denied the request and Vanderzanden resigned. Vanderzanden contends that the defendants denied her leave in retaliation for her demands for equal pay.

The district court found that, even if the County had the burden of proving legitimate reasons for discharging Vanderzanden, it had met its burden by showing that Vanderzanden was encouraged to resign because her superiors justifiably believed that she could no longer do the job. The record supports the

district court's determination.

In 1972 Vanderzanden injured her shoulder in a fall while leaving work. As a result, she was absent from work for four months, two and one-half months of which was unpaid leave.

In August 1973, Vanderzanden, then 56 years old, developed blood clots in her leg, a problem that she had intermittently since 1966. She exhausted all her sick and vacation benefits, and applied for a 90 day unpaid leave of absence. Sergeant Ramseth told Vanderzanden that her leave of absence would not be granted. Ramseth said that her poor health made it impossible for her to perform her job effectively. Vanderzanden tendered her resignation.[12] At the time of her resignation, Vanderzanden's doctor would not permit her to return to work because of her ill health.

Assuming that Vanderzanden has made a prima facie showing of retaliation, we do not find that the district court's determination that the decision to deny Vanderzanden leave was justified by legitimate business reasons is clearly erroneous. Unfortunate as the County's

decision may have been, it was justified by the record. Vanderzanden's prolonged absences from work, her chronic physical ailments, and inability to perform fully her job duties justifies the County's decision.

Vanderzanden presented evidence that Undersheriff Sheratt was granted a leave of absence as a means of showing that sne was unfairly treated. We do not think that this evidence overcomes the showing made by the defendant. Sheratt was automatically entitled to take his paid leave of absence, and returned to work only after obtaining a release from his doctor.

C. Personnel Action Forms.

At the time the plaintiffs were terminated, Sheriff Barnes signed a written "Personnel Action" form for each of them. In answer to the question "would you rehire this employee," the Sheriff checked "no" on each form. He checked "yes" on the forms for the two matrons, Holiday and Firth, who were not plaintiffs to this suit.

The district court made no express finding as to whether the Sheriff's notation constituted a Title VII

violation. It held only that the plaintiffs did not present sufficient evidence to prove that they were harmed by the notation. We find that the plaintiffs did not establish a prima facie violation of §704(a), and do not decide whether the sheriff's action was harmful to the plaintiff.[13]

As we have discussed, to establish a prima facie violation, the plaintiffs must show that there is a link between their assertion of their Title VII rights and the adverse action taken by the defendants. Miller, 590 F.2d at 320. The plaintiffs have failed to demonstrate such a link here. They presented no direct evidence that the sheriff's notations on the personnel action forms were the result of retaliation for the plaintiffs' request for equal pay. Furthermore, the plaintiffs presented no circumstantial evidence that the sheriff acted in response to the plaintiffs' equal pay demands. Moreover, the plaintiffs never confronted the Sheriff with their demands and at best the Sheriff had only a vague awareness that matrons in general were demanding equal pay. After careful

examination of the record, we can find no evidence to infer that the Sheriff knew the plaintiffs, and not Holiday and Firth, were raising equal pay claims. Only if there is evidence that the Sheriff actually knew that the plaintiffs raised such claims, rather than other matrons, can we infer that the Sheriff gave negative recommendations to the plaintiffs and positive recommendations to the other matrons for vindictive reasons. The plaintiffs presented no such evidence. Having not shown that the defendants were aware which matrons were actively supporting the claim for equal pay, the plaintiffs have not proved the necessary link between their demands and the defendants' adverse action that would establish a prima facie violation of §704(a).

D. Refusal to Rehire Vallance.

For a similar reason, we find that the plaintiffs did not establish that the defendants' refusal to rehire Vallance was a prima facie violation of §704(a).

On December 26, 1973, after she had been notified that she would be terminated, Vallance wrote to the Sheriff

requesting a transfer to the newly created position of police stenographer. Vallance indicated that she had passed all the necessary civil service tests for the position. Two days later, the Sheriff wrote to Vallance, denying her request and stating that the positions would be filled by somebody else.

On January 15, 1974, Holiday and Firth made formal written applications for the police stenographer positions; the Sheriff hired both that same day. Because neither had passed the required civil service examination at that time, their appointments were made provisional pending completion of the tests. Firth later failed the examination and was terminated. Vallance contends that the Sheriff's refusal to rehire her was in retaliation for her equal pay demands.

The district court denied Vallance's claim, finding that the Sheriff's appointments of Holiday and Firth were within his discretion under Oregon law. The court noted that Holiday had a good work record and that Firth had a satisfactory one, and that both had more seniority than Vallance.

We need not dwell long on this contention. The plaintiffs presented no direct evidence that the defendant chose Holiday and Firth over Vallance for vindictive reasons. Nor can we infer vindictiveness. There is nothing in the record that shows that defendants were aware that it was Vallance, and not Holiday and Firth, who actively sought higher pay.

Because the plaintiffs have failed to show a prima facie violation of §704(a), we need not decide whether the sheriff's refusal to rehire Vallance was justified by legitimate business reasons.

Affirmed in part, reversed in part, and remanded for further proceedings to afford plaintiffs the opportunity to establish a claim of sexual discrimination apart from an equal pay claim.

FOOTNOTES:

1 The matrons' job titles were periodically readjusted. For the sake of consistency, we use the term "matron" throughout.

2 Sheriff Barnes supervised Captain Friese and Sergeant Ramseth.

Friese supervised the persons working in the corrections division, including the matrons and Ramseth. Ramseth's duties related primarily to the handling of prisoners and he apparently had limited authority over the matrons.

3 In its analysis, the district court did not distinguish between the deputy sheriffs who worked in the jail, and their replacements, the corrections officers. The record shows that the in-jail duties of the deputy sheriffs and the corrections officers were the same and thus, we likewise find it unnecessary to draw a distinction in comparing their duties to those of the matrons. We do note because the deputy sheriffs must be certified as police officers by the State of Oregon they possess skill and training that the matrons do not have.

4 The plaintiffs did not sue under the Equal Pay Act. The Equal Pay Act did not apply to the government employees until May 1, 1974. The Fair Labor Standards Amendments of 1974, Pub. L. 93-259, §1(a), Apr. 8, 1974, 88 Stat. 55. The plaintiffs' jobs were terminated on January 15, 1974, and thus their claims are cognizable only under Title VII.

5 In full, 29 U.S.C. §206(d)(1) (1970) provides:

> No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on

> the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

6 The parties are not in complete agreement as to importance that should be assigned to the various statistical evidence introduced at trial. We agree with the district court that the average daily census more accurately reflects the prison's population. The prison's yearly census is not nearly as accurate, because it does not account for the widely-varying lengths of incarceration amoung the prisoners.

The Plaintiff also claims that the average daily population in the women's jail was 3.9 inmates per day, rather than the 1.8 figure provided by the defendants and used by the district

court. We have examined both computations and find that the district court's choice of figures was not erroneous.

7 This district court found that the clerical duties performed by the matrons included processing fingerprint cards and mug shots; filing reports and mug shots; filling out F.B.I. reports; keeping mail and medical records; recording deputy sheriff's activities; and censoring mail.

8 Mr. BENNETT. Mr. President, I yield myself 2 minutes.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows: On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

Mr. BENNETT. Mr. President, after many years of raving by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which

became effective only yesterday. By this time, programs have been established for the effective adminstration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act. The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill.

If they will confirm that understanding, I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain

exceptions.
All that the pending amendment does is recognize those exceptions, that are carried in the basic act.
Therefore, this amendment is necessary, in the interest of clarification.
The PRESIDING OFFICER. (Mr. RIBICOFF in the chair). The question is on agreeing to the amendment of the Senator from Utah.
(Putting the question.)
110 Cong. Rec. 13647 (1964).

9 Assume for example, that an employer tells a female worker, not employed at a position that is substantially equal to that performed by a male, that he would pay her $30 a week more if she was male. For want of a male counterpart performing equal work, such blatant discrimination would not be prohibited by the Equal Pay Act. Rinkel, 17 FEP Cases at 226. We find no indication, however, that the Bennett Amendment was intended to legalize such practices under Title VII. Likewise, in a situation where primarily women are employed in a type of job that is comparable but not substantially equal to that performed by men, an employer is free under the Equal Pay Act to decrease the wages of the women solely bacause of their sex. Such a practice is prohibited by the plain language of §703 and will continue to be under our interpretation of the Bennett Amendment.

10 This guideline, formerly codified at 29 U.S.C. §1604 7(1) stated that:

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 205(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of equal pay for equal work set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of tne prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

11 For instance, Sheriff Barnes testified that he thought the disparity betweeen the salaries of the matrons and the deputies should have been less. In fact, the sheriff had previously attempted to upgrade the salary of the matrons.

12 The parties dispute whether Vanderzanden was "terminated" or "forced to resign". We find that the characterization is immaterial and assume that Vanderzanden was terminated.

13 The fact that the district court failed to make an explicit finding of fact on the existence of a prima

facie violation does not preclude us from deciding this issue, especially where the record consists primarily of documentary evidence. See Magna Weld Sales Co. v. Magna Alloys & Research Pty., 545 F.2d 668, 671 (9th Cir. 1976); Armstrong v. Collier, 536 F.2d 72, 77 (5th Cir. 1976).

Opinion of the District Court
(Decided September 3, 1976)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, YVONNE M. HATTON, Plaintiffs, | ) | Civil No. 74-581 |
| vs. | ) | OPINION |
| THE COUNTY OF WASHINGTON; SHERIFF WARREN BARNES, in his capacity as Sheriff of Washington County; CAPTAIN STAN FRIESE and SERGEANT CLARENCE RAMSETH, in their capacities as Washington County Police Officers, Defendants. | ) | |

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SOLOMON, Judge:

The plaintiffs, Alberta Gunther, Velene M. Vallance, Marion E. Vander Zanden, and Yvonne M. Hatton, are four women who worked as matrons at the Washington County jail. They charged the County and Sheriff Warren Barnes with sex discrimination and assert that the County paid them less than men jailers for similar work, later fired them, and refused to rehire them, because they sought equal pay.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., was amended, effective March 24, 1972, to include states and local governments as employers prohibited from discrimination. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §2(1), 86 Stat. 103, amending 42 U.S.C. §2000 (1964) [codified at 42 U.S.C. §2000e(a)].[1] By March 1972, the plaintiffs had worked as matrons[2] at

the jail for periods varying from six months to four and a half years.

The Washington County jail lodged its men prisoners on the second floor and its women prisoners in 16 or 18 cells on the third floor. The County employed six full-time matrons: the plaintiffs here, and Dorothy Holliday and Donna Firth, who are not plaintiffs. Generally, two matrons worked on each eight-hour shift; and, on an average day, there were two women prisoners in the jail.

The matrons' principal duties were to process and guard women prisoners and to transport them to and from court.[3] Because there were so few women prisoners, the matrons spent much of their time on clerical work. The amount varied among the matrons from about ten to seventy-five per cent.[4]

In 1972, men prisoners were guarded by a staff of 13 deputy sheriffs, who were temporarily assigned, as part of their training, to jail duty for periods of a few days to a year. The deputies' responsibilities and activities were similar to the matrons', except that the deputies spent more time with the

prisoners and less time on clerical work. On an average day, there were between 50 and 60 men prisoners in the jail. Therefore, on the average, there was one guard for every four men prisoners, as contrasted with three matrons for every one woman prisoner.

In March 1972, the Washington County Police Officers' Association (the union) was formed, and the deputy sheriffs, the matrons, and other jail employees became members, the union negotiated its first contract with the County effective June 1, 1972.

In December 1972, the Washington County Commissioners, on the recommendation of Sheriff Barnes, created the positions of corrections officer and corrections officer trainee. The Commissioners' purpose was to free the time of the deputy sheriffs for patrol or "road work" outside the jail and also to professionalize the job of jail guard. The County asserts that the new positions were open to women as well as men, and the matrons do not dispute that assertion.

About the same time, the Commissioners approved increases of about ten

per cent in the salary ranges of matrons, recruits, and deputy sheriffs, among others, to coordinate their pay with that of the corrections officers and trainees. The range increases were effective February 1, 1973. The old and new monthly ranges were as follows:

| | Old | New |
|---|---|---|
| Deputy Sheriffs | $668-853 | $736-940 |
| Deputy Sheriff Recruits | 636-736 | 701-812 |
| Corrections Officers | --- | 701-896 |
| Corrections Officer Trainees | --- | 668-812 |
| Matrons | 476-606 | 525-668 |

The Commissioners rejected a proposal by the Sheriff to increase the matrons' ranges by about 30 per cent over their old salaries and about 20 per cent over their new salaries, on the grounds that it might be an unfair labor practice for the County to offer selective increases to one group of its union employees outside the collective bargaining process.

Correction officers, in June 1973, began to replace deputy sheriffs in the men's section of the jail. Shortly

thereafter, at a union meeting, plaintiff Alberta Gunther asked union officials to demand the same pay for the matrons as the new corrections officers. She was told to research the matter further.

A day or two later, Stanley Friese, captain of the jail division, spoke with Holliday, the most senior matron. Friese said that, because of the overcrowding in the men's section, the Sheriff was considering whether to board the women prisoners with another county. Holliday, with Friese's permission, reported this information to the other matrons. They testified that they interpreted Friese's remarks as a warning: if they pressed their demands for equal pay, they might lose their jobs.

Overcrowding in the men's jail was a serious problem. Between 1971 and 1973, the number of men prisoners processed by the County jumped from 1,884 to 3,280. Although the number of women prisoners also increased, there were seldom more than six women on any one day, and on some days there were no women prisoners. An increase in "weekend" sentencing, by which low-risk prisoners were

permitted to serve their time on weekends aggravated the overcrowding. The jail received unfavorable publicity after it required some prisoners to sleep on the floor. The American Civil Liberties Union investigated complaints of overcrowding and later filed an action on behalf of several prisoners.

On November 19, 1973, officials of the union and the County reviewed the matrons' demands. Shortly thereafter, Undersheriff Charles Sherratt prepared a study which he said showed that the County could save about $18,000 per year if it boarded its women prisoners at the Clackamas County jail and replaced the six matrons with two and a half police stenographers. The County Commissioners on December 18, 1973, adopted the recommendations and terminated the matrons as of January 15, 1974.

On December 26, 1973, Vallance applied for a voluntary demotion to police stenographer. The Sheriff told her that the positions were filled. On January 15, 1974, he provisionally appointed Holliday and Firth as stenographers, but there was no evidence on when he had offered them the positions.

Neither had passed the typing test, as Vallance had. Holliday later passed the typing test, and Firth was terminated when she failed to pass it. Unlike the four plaintiffs, Holliday and Firth had kept silent on the equal pay issue.

When the matrons were terminated, Sheriff Barnes filled out a "Personnel Action" form for each of them. The form asked, "Would you be willing to reemploy [this person] in the future?" On the forms for Gunther, Hatton, and Vallance, Sheriff Barnes wrote, "No". For Holliday and Firth he wrote, "Yes."

In June 1972, Matron Vander Zanden, then 55, tripped over a sidewalk on her way home from the jail and seriously injured her right arm and knee. She missed four months of work and used all her accumulated sick leave. She asked for, and received, a six-week leave of absence without pay.

In July 1973, she developed a blood clot in her leg and missed work beginning August 9. In September, she again applied for unpaid leave. Captain Friese denied the request. She asked whether the denial meant that she was being terminated, and Sergeant Clarence

Ramseth told her that he guessed that it did. Shortly thereafter, she was allowed to resign for health reasons.

Title VII of the Civil Rights Act of 1964 provides in part:

> It shall be an unlawful employment practice for an employer --
>
> . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation . . . because of . . . sex . . .; or
>
> . . . to limit, segregate, or classify his employees . . . in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of . . . sex . . . .
>
> 42 U.S.C. §2000e-2(a) (1964)

Congress added "governments, governmental agencies, [and] political subdivisions" to those employers subject to Title VII, effective March 24, 1972. Section 2(1) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e(a) (1970 ed., Supp. IV).

The County asserts that Congress exceeded its powers under the Commerce

Clause when it extended Title VII to include states and local governments. In Fitzpatrick v. Bitzer, 44 U.S.L.W. 5120 (U.S. June 28, 1976), the Supreme Court pointed out that Congress derived its authority to pass the 1972 Amendments to Title VII from Section 5 of the Fourteenth Amendment and not the Commerce Clause. The Court held that, when the States ratified the Fourteenth Amendment, they yielded some of their rights to control their own affairs to the federal government. One such right, in those areas where Congress was authorized to act under Section 5 of the Fourteenth Amendment, was the right of a State, under the Eleventh Amendment, not to be sued without its consent by its own citizens. 44 U.S.L.W. at 5123.

The County also contends that the 1972 Amendments to Title VII unconstitutionally invade rights reserved to the States by the Tenth Amendment. There is no merit in this contention. I hold that Title VII is constitutional as applied to Washington County.

A ruling on Sheriff Barnes' motion to dismiss was postponed until the trial.[5] I deny the motion to dis-

miss. The Sheriff exerted sufficient control over the salaries and the subsequent dismissals of the matrons to be considered an employer under Title VII. Nevertheless, I find that the Sheriff is entitled to qualified immunity because he acted in good faith and within his official capacity. Hutchison v. Lake Oswego School District No. 7, 519 F.2d 961, 968 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3285 (U.S. Oct. 10, 1975) (No. 75-568), cross-petition for cert. filed, 44 U.S.L.W. 3446 (U.S. Jan. 10, 1976) (No. 1049).

The matrons contend that their jobs were substantially equal to those of the deputy sheriffs and the corrections officers.[6] The County contends that there were significant differences between the men's and women's jobs and that those differences accounted for the salary differentials.

The matrons and the County assumed that men and women prisoners should be housed separately and that, generally, men should guard men and women should guard women. As a result, the matrons and the men guards worked in separate

quarters and had different workloads. The men supervised more than ten times as many prisoners for each guard as the matrons did. The matrons therefore devoted much of their time to clerical chores. The matrons do not dispute that clerical work is less valuable than guard work and entitles one to less pay than guard work.

In the summer and fall of 1973, the matrons asked for equal pay with the corrections officers. But they did not apply to become corrections officers, even though the jobs were open to them.

The plaintiffs concede that they have the burden of proving that their jobs were substantially equal to those of the men guards. Under the Equal Pay Act of 1963,[7] the plaintiffs must prove unequal pay for ". . . equal work on jobs . . . [requiring] . . . equal skill, effort, and responsibility . . . performed under similar working conditions . . ." 29 U.S.C. § 206(d)(1).

Plaintiffs have not met their burden of proving that the men's and women's jobs were substantially equal. Even though the matrons' jobs may have required as much skill as those of the

men guards, the matrons' jobs did not require equal effort or equal responsibility.

The matrons contend, however, that even if the men's jobs were more difficult, the differences in pay were much greater than the differences in difficulty of the work. The matrons contend that some of the differences in pay can be explained only by the existence of sex discrimination.

The case of Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), on which the matrons rely, is not in point. There the Supreme Court noted that the District Court had held that the employer ". . . had 'strictly segregated' the plant's departmental 'lines of progression' . . . reserving the higher paying and more skilled lines for whites . . ." 422 U.S. at 409. Nevertheless, the District Court refused to award back pay. The Supreme Court held that, given a finding of unlawful discrimination, back pay ". . . should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout

the economy and making persons whole for injuries suffered through past discrimination." 442 U.S. at 421 (footnote omitted).

Here the basis for an award of back pay--finding of unlawful discrimination--is lacking.

If the jobs are substantially dissimilar, that is the end of the inquiry. See 29 C.F.R. §800.120 (1965). Under these circumstances, the overpayment of corrections officers or the underpayment of matrons are not matters which I can either explore or correct. The union may not have been as aggressive as it should have been in supporting the matrons' demands for equal pay, but that dereliction, if it was one, cannot be charged to the County. There was no allegation here of a conspiracy between the union and the County.

The plaintiffs also contend that the County dismissed them, and refused to rehire them, because they demanded equal pay.

No employer, private or governmental, should be prevented from eliminating an unnecessary position

merely because all the holders of that position are women--provided there are good, nondiscriminatory reasons why they are all women and why the position should be eliminated.

The County, its jail officers, and its women prisoners shared a legitimate concern that at least some of those who guarded the women prisoners be women.[9] Because the staff was so small, it was probable that all or almost all those who guarded women would be women.

The County's objectives in eliminating the matrons' positions were to save money and make better use of the jail space. The existing arrangement made no sense. Each man guarded about four prisoners; each matron guarded about one-third of a prisoner. The men's section often overflowed, while the women's section averaged ten or more empty cells. The County's objectives were both reasonable and commendable.

The Sheriff's appointments of Holliday and Firth, rather than Vallance, as police stenographers were within his discretion. See ORS §§ 204.601(2) (1953) and 204.635(2)

(1963). Holliday had a good work record and Firth a satisfactory one. Both had more seniority than Vallance.

The plaintiffs also assert that they were prejudiced in their attempts to regain employment with the County because of the Sheriff's notation in the termination order against rehiring them. The matrons did not present sufficient evidence to prove that they were harmed by that notation.

Mrs. Vander Zanden contends that she was coerced into resigning after the County denied her request for an unpaid medical leave. The evidence is undisputed that Vander Zanden was a good worker when she was healthy;[10] but, as she noted on her application for employment as a matron, she had experienced medical problems with her legs since at least 1966.

In September 1973, when she asked for a leave of absence, she had already missed several weeks' work because of a blood clot in her leg. She was then 56, and had spoken of retirement. According to the official job description, the work of a matron required ". . . good physical condition and physical strength

to handle unruly inmates."

Even if the County had the burden of proving legitimate, nondiscriminatory reasons for discharging Mrs. Vander Zanden, cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 et seq. (1973), in my view the County met its burden. Mrs. Vander Zanden was encouraged to resign not because she asked for equal pay, but because her superiors justifiably believed that she could no longer do the job.

Plaintiffs' action should be dismissed. No costs or attorneys' fees.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed R. Civ. P. 52(a).

FOOTNOTES

1 The legislative history is discussed in Fitzpatrick v. Bitzer, 44 U.S.L.W. 5120, 5121 n.2 (U.S. June 28, 1976).

2 Although the matrons' job titles and duties were periodically adjusted, the term "matron" is here used for the sake of consistency.

3 An official job description gave these examples, among others, of

the matrons' duties: register, assign, examine, and instruct new prisoners; dispense minor medication; supervise visitors; censor mail; inspect living quarters and supervise light housekeeping; transport prisoners to and from court or for medical treatment; attend mental patients at hearings; and test sobriety with a breathalyzer. The matrons were also required to sit in on interviews and to maintain ". . . a constant security watch . . . ."

4 These clerical activities included: processing fingerprint cards and mug shots; filing reports and mug shots; filling out F.B.I. reports; keeping mail and medical records; recording deputy sheriffs' activities; and censoring mail.

5 Captain Friese and Sergeant Ramseth were dismissed as defendants by stipulation.

6 The matrons filed this action under the Equal Pay Act of 1963, 29 U.S.C. §206(d), as well as Title VII. Although the constitutionality of the Equal Pay Act, as applied to States and local governments, is now in doubt, see National League of Cities v. Usery, 44 U.S.L.W. 4974 (U.S. June 24, 1976), I need not reach that issue because the Equal Pay Act did not apply to governmental employers until May 1, 1974. The matrons were terminated January 15, 1974.

7 The Equal Pay Act of 1963, 29 U.S.C. §206(d), and Title VII are interlocked, see 42 U.S.C. § 200e-2(h), and the sex discrimination prohibitions of Title VII must be construed in the

same manner as the Equal Pay Act. Schultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir.), cert. denied, 398 U.S. 905 (1970). Even if the Equal Pay Act is unconstitutional as applied to States and local governments, the precedents under it are useful for Title VII purposes.

8 Section 2000e-2(e)(1) of Title 42, U.S.C., permits an employer to hire on the basis of sex where sex is ". . . a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ."

The County contended that sex was a bona fide occupational qualification for at least some of the matrons' jobs, and the matrons did not dispute this contention.

9 Under Oregon law, a woman must be present "when a female prisoner requires a search or at any time during confinement that a female prisoner's cell needs to be entered", ORS § 169.075(3) (1973), or "[w]henever any woman or girl is interrogated with reference to the commission of any sexual crime . . . whether . . . committed by her or by some other person", ORS § 136.345. And: "Whenever . . . the sheriff of any county . . . convey[s] any female to any of the penal, reformatory or eleemosynary institutions of this state, the sheriff shall cause such person to be accompanied by a female attendant to the place of confinement." ORS § 137.360(2).

10 For example, Captain Friese

wrote on a 1972 merit rating: "Has not been in the best of health & is not a fast worker. However she works hard & is a dependable employee. Does her best at whatever she does & does not complain."

Order of the Court of Appeals
Denying Petition for Rehearing
(Filed May 1, 1980)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, YVONNE M. HATTON, Plaintiffs-Appellants, | ) | No. 76-3448 |
| vs. | ) | ORDER |
| THE COUNTY OF WASHINGTON: SHERIFF WARREN BARNES, in his capacity as Sheriff of Washington County; CAPTAIN STAN FRIESE and SERGEANT CLARENCE RAMSETH, in their capacities as Washington County Police Officers, Defendants-Appellants. | ) | |

Appeal from the
United States District Court
for the District of Oregon

Before: MERRILL and TANG, Circuit Judges and TAYLOR,* District Judge.

*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

TANG, Circuit Judge:

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Supplemental Opinion on Denial of Rehearing is ordered filed and the petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

Equal Pay Act
29 U.S.C. § 206(d)(1)

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantify or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Title VII of the
Civil Rights Act of 1964
42 U.S.C. §2000e-2(a),(h)

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

. . .

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful

employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its adminstration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).